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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

9 OMAR LOPEZ-CASTILLO,

10 Petitioner,

11 v.

12 PAT GLEBE,

13 Respondent.

NO. C08-1598-JLR-JPD

ORDER DENYING PETITIONER'S
MOTION TO COMPEL AN
ANSWER

14
15 Respondent filed a motion to dismiss the amended 28 U.S.C. § 2254 habeas petition
16 (Dkt. 23) at the same time as a statement of cause for filing a dispositive motion in lieu of an
17 answer (Dkt. 24). Petitioner Omar Lopez-Castillo, through counsel, moves for an order
18 compelling respondent to file an answer. (Dkt. 25.) Having reviewed the parties' motions as
19 well as the balance of the record, the Court DENIES petitioner's motion to compel an answer
20 (Dkt. 25).

21 Respondent argues that Mr. Lopez-Castillo's amended habeas petition is barred by the
22 one-year statute of limitations contained in 28 U.S.C. § 2244(d), and that he is not entitled to
23 the application of equitable tolling. (Dkt. 23, 8–21; Dkt. 24, at 1.) Mr. Lopez-Castillo
24 concedes that his habeas petition appears to be time-barred but argues that he is entitled to
25 equitable tolling due to external circumstances beyond his control, which include illiteracy, an
26 inability to speak a language that anyone in the prison understands, and perhaps other mental

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1 competency issues. (Dkt. 16, at 26, 28; Dkt. 25, at 3–4; Dkt. 28, at 7.) The parties agree that
2 whether a petitioner is entitled to equitable tolling is a fact-specific inquiry. (Dkt. 23, at 12;
3 Dkt. 28, at 7); *see Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per
4 curiam).

5 The Court finds that respondent has adequately justified filing a motion to dismiss in
6 lieu of an answer. The Court recognizes that resolving respondent’s motion to dismiss may
7 require further discovery, expansion of the record, or an evidentiary hearing to determine how
8 much, if any, of the period relevant to Mr. Lopez-Castillo’s petition should be equitably tolled.
9 *See, e.g., Laws v. Lamarque*, 351 F.3d 919, 924–25 (9th Cir. 2003) (holding that the district
10 court should have allowed discovery or ordered expansion of the factual record based upon the
11 un rebutted allegation that he was not legally competent during the period of time relevant to
12 equitable estoppel). Regardless, whether the amended petition is time-barred is a threshold
13 question that may preclude the Court from proceeding to consider the merits of the amended
14 petition. *See* 28 U.S.C. § 2244(d)(1)(A). Until that determination is made, additional
15 expenditures of the parties’ time on briefing the merits is unnecessary.

16 The Court DENIES petitioner’s motion to compel an answer (Dkt. 25). Should the
17 Court determine that an evidentiary hearing is warranted, it shall direct the parties to confer
18 regarding logistics¹ and to contact the Court regarding scheduling.

19 DATED this 28th day of October, 2009.

20 
21 JAMES P. DONOHUE
22 United States Magistrate Judge
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25 ¹ Counsel for petitioner states that he has found only one interpreter, who lives in
26 Fresno, California, who can effectively communicate with Mr. Lopez-Castillo in his native
language of Mixteco. (Dkt. 27, at 3; *see* Dkt. 28-2, at 1 (Petitioner’s Decl. ¶ 2).)